IN THE

# Supreme Court of the United States

OCTOBER, 1942, TERM.

No. .....

J. W. SANDERS COTTON MILL, INC.,
PETITIONER,

VS.

LULA MOODY, RESPONDENT.

## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

This is an application for a writ of certiorari to review the judgment of the Supreme Court of Mississippi affirming the judgment of the Circuit Court of Lauderdale County, Mississippi, awarding recovery to respondent as plaintiff in the latter court, in the amount of $8,000 against petitioner as defendant.

## OPINION BELOW.

No opinion was filed by the Supreme Court of Mississippi to support its judgment, review of which is sought by the petition herein. However, opinions were rendered on former appeals in *J. W. Sanders Cotton Mill, Inc.*, v. *Moody*, 189 Miss. 284, 195 So. 683, and *J. W.*

*Sanders Cotton Mill, Inc.*, v. *Moody*, 191 Miss. 604, 2 So. 815. The action of the court on the third appeal, and which this petition seeks to have certified to this court for review, is unofficially noted as *J. W. Sanders Cotton Mill, Inc.*, v. *Lula Moody*, 10 So. 2d 544, and is shown at pages 532 to 542 of the original Record.

## JURISDICTIONAL STATEMENT.

The jurisdiction of this court conferred by Section 240 of the Judicial Code, as amended by the Acts of February 13, 1925, Subsections (a) and (b), (28 U. S. C. A., 347) is invoked by this petition. Within the time allowed by Rule XIV of the Supreme Court of Mississippi (Mississippi Code Supplement of 1938, p. 1900), petitioner filed its Suggestion of Error (R. 533), which was overruled on the 11th day of January, 1943 (R. 542). Under Mississippi practice, this was the date upon which the judgment of the Supreme Court became final. *Love* v. *Mayor and Board of Aldermen of Yazoo City*, 166 Miss. 322, 148 So. 382.

## SHORT STATEMENT.

The respondent, Lula Moody, brought her action against petitioner, to recover for personal injuries alleged to have been sustained while she was employed in petitioner's cotton mill at Meridian, Mississippi. The cause was tried three times in the Circuit Court of Lauderdale County, Mississippi, the first two trials resulting in judgments on verdicts for respondent in the amount of $7,000, both of which were reversed on appeal to the Supreme Court of Mississippi. On the third trial a judgment was entered on a verdict for respondent in the amount of $8,000, and on appeal the Supreme Court of Mississippi was affirmed without an opinion. Petitioner contends that, under the law as announced on the first appeal, the judgment should have been reversed for the same

errors, and that the failure of the Supreme Court to reverse amounted to a denial to petitioner of equal protection of the laws. Petitioner also contends that the fact of respondent's leading counsel having become Sheriff of Lauderdale County, and therefore the principal executive officer charged with duties in connection with the drawing of the jury, the summoning of jurors and witnesses, and the performance of other duties in and about the court, and the injection of collateral issues into the trial, among which were the facts of personal animosities between certain of petitioner's employees, executives, and witnesses in this case, and the Sheriff and former leading counsel of respondent, amounted to a denial to respondent of due process of law.

## STATEMENT OF FACTS.

Respondent brought her action against the petitioner for personal injuries. She alleged that while employed in petitioner's cotton mill, at Meridian, in Lauderdale County, Mississippi, she suffered an injury to her foot, as the result of the falling of a clearer board from a spinning frame while she was brushing the dust and lint therefrom with her left hand, while performing other functions with her right hand. The case was tried three times in the Circuit Court of Lauderdale County, and on all three trials verdicts and judgments were rendered against petitioner. On the first two trials judgments were reversed by the Supreme Court of Mississippi, as indicated above. On appeal from the third judgment, the Supreme Court affirmed without an opinion, and it is this judgment of the Supreme Court which petitioner seeks to have reviewed by this Honorable Court.

### Petitioner's Defenses.

Since only constitutional questions are involved on this petition, it is not thought that a detailed statement of the very large amount of conflicting evidence as to the

happening of the occurrence, petitioner's responsibility therefor and the extent of the injury, would be helpful. However, since the Supreme Court of Mississippi held on both the first and the second appeals (*J. W. Sanders Cotton Mill, Inc.*, v. *Moody*, 189 Miss. 284, 301, 195 So. 683, 689; 191 Miss. 604, 611, 2 So. 2d 815, 816) that the evidence presented issues which required the submission of the case to the jury and it is petitioner's contention that the organization of the court and the conduct of the trial were such as to deprive it of due process of law and equal protection of the laws; a factual presentation of the matters complained of requires a more detailed study of the surrounding circumstances and conditions, in connection with the trial, than ordinarily would be appropriate.

The defenses offered by petitioner, as disclosed from the entire record, and which are summarized from the brief filed with the Supreme Court of Mississippi on the last appeal, were as follows:

I. The Motion to quash the juries because of the participation of the Sheriff in drawing and summoning them should have been sustained.

II. Plaintiff's testimony was unbelievable.

A. Plaintiff changed her whole theory of negligence.

B. Plaintiff's testimony as to the occurrence of the injury and the extent thereof was unbelievable.

C. The condition of plaintiff's foot was occasioned by injuries received on prior occasions.

III. Errors as to liability.

A. Testimony did not show any reasonable standard of care.

B. Alleged defects in the machine were not shown to be the proximate cause of the injury.

C. The evidence showed that there was a safe way to do the work as distinguished from an unsafe way, and that respondent chose the unsafe method.

D. No negligence was shown on the part of the defendant, because the evidence disclosed that the injury was not reasonably foreseeable.

E. The evidence did not disclose that respondent had any notice or knowledge of the defects in the machine.

IV. The case was tried on collateral issues, on all of which respondent was permitted to introduce testimony which was prejudicial to petitioner.

A. Other times and places.

B. Plaintiff forced to work several days after the alleged injury.

C. Personal animosities between petitioner's foreman, Anders, and other witnesses, and Sheriff Fred A. Ross, the former leading counsel for respondent.

D. Prejudicial statements of counsel as to matters not within the issues, and on which evidence was not introduced, made in the presence of the jury.

E. Leading questions propounded by counsel for respondent to respondent's witnesses.

F. Respondent permitted to present an entirely new theory in the evidence offered in rebuttal after petitioner had rested.

## Sheriff Was Respondent's Former Leading Counsel.

The original leading counsel for respondent was the Honorable Fred A. Ross, of Meridian, Mississippi, and associate counsel was her present counsel, the Honorable M. V. B. Miller (R. 8). After the action was tried the first time, and while the first appeal was pending, Attorney Ross was elected to the office of Sheriff by the Popular vote of Lauderdale County, and qualified and assumed the duties of that office (R. 22).

Section 3310 of the Mississippi Code of 1930 provides:

> "Every Sheriff shall have power to appoint one or more deputies, and to remove them at pleasure; every appointment to be in writing * * *"

Section 3316 of the Mississippi Code of 1930 provides as follows:

> "Every Sheriff, by himself or his deputy, shall from time to time execute all notices, writs, and other process, both from courts of law and chancery, and all orders and decrees to him legally issued and directed within his county, and shall make due returns thereon to the proper court * * *"

Section 3315 of the Mississippi Code of 1930 provides as follows:

> "The sheriff shall be the executive officer of the Circuit and Chancery Court in his county, and shall attend all the sessions thereof with a sufficient number of deputies or bailiffs. He shall execute all orders and decrees of said courts directed to him to be executed, and shall take into his custody and safely keep in the jail of his county, all persons committed by the order of either of said courts, or by any process issuing therefrom, or lawfully required to be held for appearance before either of them."

Section 3329 of the Mississippi Code of 1930 provides as follows:

> "It shall be the duty of the Sheriff to keep the peace within his county, by causing all offenders in his view to enter into bond, with sureties, for keeping the peace and for appearing at the next Circuit Court, and by committing such offenders in case of refusal; which bonds he shall certify and return to the court. It shall be his duty to quell riots, routs, affrays and unlawful assemblages, and to prevent lynchings and mob violence, and whenever necessary he shall call to his aid the power of the county; and any person who shall fail, neglect or refuse to respond to the call of the sheriff for such aid shall be

reported by the sheriff to the Circuit Court, and it shall be his duty to prosecute all such persons, who, upon conviction, shall be punished as for a misdemeanor. * * * He shall pursue, apprehend, and commit to jail all persons charged with treason, felony, or other crimes; and he may take bonds, with good and sufficient sureties, of any person whom he may arrest on the process of any circuit court charged with any crime not punishable with death, conditioned for the appearance of the offender at the next term of said court, and fix the amount of such bonds, in case the court or judge has omitted to do so, unless the process be returnable forthwith."

It will be noted from the foregoing section that in addition to his duties as executive officer of the court, the Sheriff exercises certain functions which are judicial in character, and that as the chief conservator of the peace in his county, he is given direct and specific command and authority over all of the citizens thereof, both with respect to the crimes they may have committed, and with the assistance that they may be required to give in apprehending offenders and enforcing the law.

Section 3331 of the Mississippi Code of 1930 provides as follows:

"The Sheriff shall have charge of the court house and jail of his county, and the premises belonging thereto, and of the prisoners in said jail, and he shall preserve the said premises and prisoners from violence, and from any injuries or attacks by mobs or otherwise, and from trespassers and intruders. * * *"

In addition to the foregoing, the Sheriff is made the tax collector of his county by Section 3341 of the Mississippi Code of 1930. Section 3001, Mississippi Code of 1930, provides as follows:

"The first process in all cases, civil and criminal, and in all courts, to compel the attendance of witnesses, shall be a subpoena, directed to the Sheriff or to some proper officer of the county where the

witness may reside, stating the time and place for the appearance of the witness, the parties to the cause, and the party at whose instance the witness is subpoenaed. * * *"

Section 3005 of the Mississippi Code of 1930 provides as follows:

"Subpoenas shall be served personally as a summons is required to be served; and the person so subpoenaed shall appear; if a civil suit be settled * * *"

Section 2033 of the Mississippi Code of 1930 provides as follows:

"The Board of Supervisors at the first meeting in each year, or at a subsequent meeting if not done at the first meeting, shall select and make a list of persons to serve as jurors in the Circuit Court for the twelve months beginning more than thirty days afterward, and as a guide in making the list they shall use the registration book of voters, and shall select and list the names of qualified persons of good intelligence, sound judgment, and fair character, and shall take them as nearly as they conveniently can, from the several supervisor's districts in proportion to the number of qualified persons in each, excluding all who have served on the regular panel within two years, if there be not a deficiency of jurors. * * *"

Section 208 of the Mississippi Code of 1930 provides as follows:

"The Sheriff of the county shall attend all meetings of the Board of Supervisors, either in person or by deputy, and shall execute all its process and orders; for which actual attendance he shall be allowed his fees by the Board, as fixed by law."

Section 2039 of the Mississippi Code of 1930 provides for the drawing of jurors under the supervision of the Judge of the Circuit Court. However, an alternative method is provided by Section 2041, and the record in this case shows from the testimony of Sheriff Ross and his deputies (R. 21-22) that the alternate method was followed

at the term in which this case was tried. Section 2041 provides as follows:

> "Whenever the jurors have not been drawn by the Judge in open court, he may draw them in vacation, if convenient; and if he do not, and whenever jurors are required for a special term and the Judge so directs, the clerks of the Circuit and Chancery Courts and the Sheriff shall, at the time they should have opened the envelopes, draw the jurors for the term of court, and make and certify lists thereof; and the Clerk shall issue and deliver to the Sheriff the proper venire facias."

Section 2044 provides that,

> "The Sheriff shall forthwith execute the venire facias by summoning each juror at least five days before the first day of Circuit Court, if practicable, either by personal service or by leaving a written notice at his usual place of abode; and he shall make return of the venire on the first day of the term. And any juror who, being summoned, does not attend, shall be fined not exceeding $100; * * *"

Prior to the commencement of the trial, petitioner moved to quash the jury which the Sheriff had participated in drawing from lists prepared by the Board of Supervisors while he was on attendance with the Board as its principal executive officer, either in person or by deputy. The testimony (R. 22 to 45) showed that all of the functions required of the Sheriff were performed by him in the normal manner, as contemplated by statutes. Every juror on attendance at the court, and every witness who attended in response to a subpoena, had been served by the Sheriff or his deputies.

The trial judge undertook to discredit this showing by stating into the record (R. 40) that supplemental jurors were drawn in open court. The court further undertook to preserve the appearance of fairness by disqualifying the Sheriff from acting in the course of the trial, and qualifying the coroner to act in place of the Sheriff pursuant to Mississippi Code of 1930, Section 651 (R. 44).

It will be noted that the Sheriff continued to function as chief executive officer of the court, pursuant to Section 3315, *supra,* except in connection with the trial of this case; that he continued as the chief peace officer of the County, pursuant to Section 3329, *supra,* except that he was not required to keep order in the court room; and that he continued to have charge of the Court House and Jail and the premises belonging thereto, and perform the duties with respect thereto required of him by Section 3331, *supra.*

**Collateral Issues.**

During the pendency of the first appeal in this case, the Supreme Court of Mississippi addressed a memorandum to the attorneys of record. A copy of this memorandum will be attached to this brief as an appendix thereto, but, for convenience, the following portion is quoted:

> "* * * but there is too much danger in allowing examinations to go to such lengths that the particular merits may be obscured and that passion may be aroused by these extraneous considerations * * * it (cross-examination) should never be permitted to proceed so far into collaterals as to raise a doubt whether the verdict is upon the real issues or whether upon general principles that the plaintiff or the defendant, one or the other, is by his general character or conduct deserving of a verdict against him, be the precise facts what they may * * *"

All of the instances in which the trial was allowed to proceed into collateral issues will not be referred to in this brief summary. However, certain of the more glaring instances will be pointed out.

1.

OPERATION BY OTHERS AT OTHER TIMES AND PLACES.

Witnesses were permitted to testify about the breaking of thread at various times and places (R. 67), about the use of sideboards (R. 67), that other times and places

operatives moved fast (R. 74), and used hooks and instruments (R. 80), and where an operative's eyes were centered at other times and places (R. 190-1, 211). Witnesses were permitted to testify as to how certain operations were carried on in other mills (R. 209-10), the age of the spinning frames in the room where respondent alleged she was injured (R. 350), how each particular operative performed the simple operation of cleaning these clearer boards (R. 71, 74-5, 80, 107-8, 177, 189, 208, 217, 231-2), and that repairmen had broken latches (R. 308-9) and replaced them (R. 312-13) at other times and places.

Respondent went so far into collaterals as to show by witnesses who had not worked at the mill for three years (R. 297) and eighteen years (R. 212), the details of how and what was done at these remote times.

The recurrence of this sort of testimony was manifold. It laid emphasis on the fact that respondent and all others who worked at the mill were required to go speedily from place to place as the operation of the machine demanded their attention. It tended to create the impression that thread was constantly breaking, and that the eyes of the spinners were focused on certain things, and that other spinners performed certain operations in various ways. Other instances of excursions into collaterals are presented in the record at pages 67-71, 73-75, 80, 97-100, 107-112, 180-2, 189-90, 208-11, 217, 231-2, 312-13, 350.

Respondent was permitted to play on the sympathies of the jury by repeating, over the objection of petitioner, that she was poor and had to work, and the jury was permitted to infer that she was compelled by petitioner to work (R. 97, 100, 176).

2.

PREJUDICIAL STATEMENTS OF COUNSEL NOT SUPPORTED BY EVIDENCE.

There are numerous instances in the record (too many to catalog) in which respondent's counsel made side remarks in the presence of the jury for the obvious

purpose of prejudicing it against petitioner. An instance of this is shown in the record at page 326, when petitioner's attorney was engaged in developing from the witness Anders, petitioner's spinning foreman, that the witness was interested only in the results obtained and not in the details of the methods employed by the individual spinners in performing their work. The following occurred:

> "Q. What was it that you, as head of that spinning department were interested in as to that?
>
> By Mr. Miller: We object to what he was interested in as to that.
>
> By the Court: Overruled.
>
> By Mr. Miller: He was interested in making the money in the Mill. We object to what he was interested in.
>
> By Mr. Cameron: We move to exclude counsel's statement that he was interested in making money for the Mill."

Another instance appears in the record at page 122:

> "Wait a minute, Miss Moody. I asked Mr. Cameron to let me go the other day. He objected to me going. I asked him to let me send someone. Now, he wants to take this woman and send her up there, and we object to it."

Under the guise of cross-examination, and in ostensible attempt to lay predicate for the impeachment of witnesses, respondent's counsel injected countless inuendoes and statements into the proceedings with the view of obscuring the real issues and prejudicing the jury against petitioner. Thus, at page 344 of the Record, we find the following:

> "Well, while you were looking at the frames every day, did you see poor old Lula dragging herself there with that crippled foot?"

3.

SHERIFF ROSS MADE AN ISSUE IN THE TRIAL.

By means of side remarks and unsworn statements such as those mentioned above, and improper cross-examination, respondent was given the advantage of the prestige and popularity of Sheriff Ross in contrast to the prejudice and passion aroused against petitioner. First, the witness Anders was grilled as to whether or not he had engaged in the process of shadowing witnesses who had come to Ross's office to talk about the case (R. 340-1). Thereafter, the court permitted Ross to be recalled to the witness stand to testify concerning the animosity between himself and Anders (R. 464, 482-5). The same procedure was followed with reference to the testimony of petitioner's witness, Dr. Klein. This witness was grilled at length concerning his alleged mistreatment of Sheriff Ross (R. 367-70, 378, 440-1).

That respondent received full benefit from this prejudicial conduct is disclosed by a few excerpts from the argument to the jury:

> "That ain't all gentlemen. When those humble witnesses go to consult with the man who is to speak in this court room in the interest of the rights of that woman, follow them around. Whenever they intimidate witnesses, gentlemen, they got an unjust cause, you know it" (R. 12).
>
> "Just like it is in life when it comes to medical services. Yes, those that have got it to pay for it go have the high and mighty from the various hospitals * * * I will put it this way—can hire the kind Mr. Cameron recommends so highly to you as being such noted experts" (R. 516).
>
> "Yes, Lula's kind, just as in life, get along as best they can" (R. 516).
>
> "Do unto this woman as you would have somebody do to your baby. Give her a fair deal, don't rob her because she is from the low, and the meek, and the humble."

## ARGUMENT.

As stated above, a fair presentation of this case requires a more detailed consideration of the actual setting in which it was tried than ordinarily would be undertaken. The attention of the court is called to the case of *Thomas Henry Trott, Petitioner,* v. *McDonough Motor Express Company, Inc., a Corporation et al., Respondent,* now pending on application of the petitioner for leave to proceed *in forma pauperis.* It will be noted that the Honorable M. V. B. Miller, Attorney for Respondent in this case, was attorney for respondent, McDonough Motor Express Company, who was the defendant in the court below in the Trott case. Moreover, it will be noted that petitioner's present attorney in this court was appearing on behalf of Trott, the plaintiff, on the trial of this action against McDonough; the position of the parties being exactly reversed as to their representation of plaintiffs or defendants. The following quotation is taken from the testimony of Sheriff Fred A. Ross, the former leading counsel for Respondent, and the present Sheriff of Lauderdale County, as the same appears at pages 27 and 28 of the Record herein:

> "Q. Mr. Martin Miller, the attorney handling this case, is your personal attorney, is he not?
>
> A. Well, if I have a personal attorney, he would be it. I don't have an attorney employed regularly, and haven't had an occasion in my two years in the Sheriff's office to have one. Frankly, I have been lucky. But Mr. Martin Miller would represent me if I had a matter in court. But he is not my attorney in the sense he is employed. He is one simply I would go to because I recognize his legal ability.
>
> Q. He was your campaign manager for Sheriff?
>
> A. No, he supported me, helped me get elected. But I was my own campaign manager. I didn't have enough money to hire one, that is the truth about it."

In view of the foregoing and in order that the court may have the benefit of such assistance as may be rendered, the brief filed in support of the petition of Trott is presented herewith as an appendix to this brief. Petitioner feels that all that was said on behalf of Trott may be repeated with like force and multiple application in support of its petition.

As has already been indicated, petitioner contends that the petition should be granted in this case upon any one, or all, of the three following grounds:

1. Petitioner was deprived of due process of law by being required to appear and defend in a court having as its principal executive officer the former leading counsel for respondent; and before a jury in the selection, summoning and impaneling of which the Sheriff was required to act, either individually or through his deputies, amenable only to him, or with the concurrence of other officers.

2. That the action of the Supreme Court of Mississippi in declaring that no judgment should be allowed to stand where the trial had proceeded so far afield from the issues joined, and into wholly collateral matters, that it could not be determined whether or not the verdict was rendered upon the issues joined or upon the collaterals, establish the law of the case, as well as the law of the State of Mississippi; and its subsequent action in affirming the judgment here under review amounted to a denial to petitioner of equal protection of the law.

3. That petitioner has been deprived of due process of law and equal protection of the laws by the cumulative effect of permitting the Sheriff and chief executive officer of the county, who was the former leading counsel for respondent, to participate in every step of the selection, summoning and impaneling of the jury, to allow the trial to proceed into collaterals which included personal animosities between certain of petitioner's witnesses and the Sheriff, and to permit the conduct of the proceedings so that petitioner was made the victim of passion and prejudice.

To fully understand the action of the Supreme Court of Mississippi, it is necessary to consider Sections 286 and 287 of the Constitution of Mississippi (Mississippi Code, 1930, page 138), which are as follows:

> "Section 286. The Supreme Court shall consist of six judges, that is to say, of three judges in addition to the three provided for by section 145 of this Constitution, any four of whom when convened shall form a quorum. The additional judges herein provided for shall be selected one for and from each of the Supreme Court districts in the manner provided by Section 145 of this Constitution, or any amendment thereto. Their term of office shall be as provided by Section 149 of this Constitution, or any amendment thereto.
>
> "Section 287. The Supreme Court shall have power, under such rules and regulations as it may adopt, to sit in two divisions of three judges each, any two of whom when convened shall form a quorum; each division shall have full power to hear and adjudge all causes that may be assigned to it by the court. In event the judges composing any division shall differ as to the judgment to be rendered in any cause, or in event any judge of either division, within a time and in a manner to be fixed by the rules to be adopted by the court, shall certify that in his opinion any decision of any division of the court is in conflict with any prior decision of the court or of any division thereof, the cause shall then be considered and adjudged by the full court or a quorum thereof."

The first two appeals in this case were heard and determined by Division B of the Supreme Court of Mississippi. The third appeal was heard and determined by Division A.

Petitioner does not complain that the laws of the State of Mississippi fail to provide for due process of law to litigants and suitors. It confines its contention to the narrow proposition that, where the officers clothed with the authority of the sovereign state conduct a proceeding devoid of the rudimentary requisites of fair play, and in

violation of the fundamental concepts of justice embodied in the constitutional guaranties of due process of law and equal protection of the laws, these guaranties have been violated. In such cases, the action of the officers clothed with the power and authority of the state is no less state action than if these judgments had been the result of a statutory enactment of its Legislature providing for discrimination and unwarranted action. *Yick-Wo* v. *Hopkins,* 118 U. S. 356. See also *Moore* v. *Dempsey,* 261 U. S. 86; *Brassfield* v. *U. S.*, 272 U. S. 448.

Petitioner does not request this court to review the merits of the trial in the Circuit Court of Lauderdale County, or the considerations which may have influenced the division of Supreme Court hearing the last appeal, although petitioner would welcome such an appraisal. The question here is not whether or not respondent was entitled to recover against petitioner, but whether or not petitioner was accorded the protection and fair treatment guaranteed by the Fourteenth Amendment. In *Tumey* v. *Ohio,* 273 U. S. 510, 535, this court said:

> "It is finally argued that the evidence shows clearly that the defendant was guilty and that he was only fined $100 which was the minimum amount, therefore that he cannot complain of a lack of due process, either in his conviction or in the amount of the judgment. The plea was not guilty and he was convicted. No matter what the evidence was against him, he had the right to have an impartial judge. * * *"

Petitioner denied the charges in respondent's declaration and offered defenses. It contends that due process and equal protection guaranteed to it the right to have these defenses heard and determined by an impartial court, and to have the prevailing principles of law applied to the conduct of the proceedings.

Petitioner feels that this case presents a test as to whether or not the Supreme Court of the United States, in the exercise of the ultimate judicial power of the central

government will pierce the veil of apparent procedural regularity to determine whether or not the fundamental concepts of due process have been observed and equal protection has been afforded. If this court grants the petition and reverses the judgment of the Supreme Court of Mississippi, it will have done no more than Division B of the Supreme Court has done on the two former appeals; that is, to say to Respondent "We do not say you are not entitled to recover, but we do say that, in order to recover, you must not violate the law to obtain your recovery, and you must submit your case in accordance with the fundamental concepts of justice and fair play, and to a court so constituted as to be able to administer the law with equal protection to all."

1.

**Sheriff Disqualified.**

This court will have observed that, in Mississippi, the Sheriff has all of the muniments of power that traditionally go with the office. In addition to this power, many others, some of which are mentioned in the statutes quoted above, have been specially conferred upon him. It should be observed from the statutes mentioned above, that no step may be taken for the selection, drawing and summoning of jurors without the concurrence of the Sheriff, except in the special cases where he is disqualified and appropriate action is taken upon his disqualification.

The principles controlling in such cases have been so clearly stated by the Supreme Court of Tennessee in the case of *Oliphant* v. *State*, 153 Tenn. 130, 282 S. W. 206, 208, that a quotation from that opinion will best serve the purpose of this argument:

"In 16 R. C. L., Par. 50, p. 233, it is said:

> 'It is a well settled rule, in the absence of a statute, that the right to a fair and impartial jury may not be impaired by the selection or summon-

ing of the jury by an officer who is legally disqualified for the performance of such duty, and, accordingly, it is held that the disqualification of the proper officer necessitates the appointment of a substitute whenever the point is raised by the litigant. This rule is strictly enforced, and the disqualification of the officer is invariably held to be a ground for challenging the panel selected by him, so that the party prejudiced may be given an opportunity to have a jury selected by an impartial officer. It is the duty of the officer who summons jurors, or who selects and summons talesmen, to use his best efforts to secure men of intelligence and good moral character, and in doing this he should act with entire impartiality between the prosecution and the defendant.'

"In 35 C. J., Par. 240, p. 276, it is said:

'It is essential to the fair and impartial administration of justice that the jury should be selected and summoned by officers having no interest in the matters to be tried by it. An officer is not qualified to act in summoning a jury if he is a party to the action, a relative, or an attorney of one of the parties, a relative of deceased in a homicide case, or if he is interested in the event of the action, although not a party of record.'

"To the same effect is *Quinebaug Bank* v. *Tarbox*, 20 Conn. 510; *State* v. *Barber*, 88 Pac. 418, 13 Idaho 65; *People* v. *Felker*, 28 N. W. 83, 61 Mich. 114; *Grisson* v. *State*, 185 Pac. 452, 16 Okla. Cr. 569; *Harjo* v. *U. S.*, 98 Pac. 1021, 1 Okla. Cr. 590, 593, 20 L. R. A (N. S.) 1013; *Patrick* v. *Commonwealth*, 78 S. E. 628, 115 Va. 933.

"In *Koontz* v. *State*, 139 Pac. 842, 10 Okla. Cr. 553, Ann. Cas. 1916A, 689, it is said:

'It is essential to a fair and impartial administration of justice that an open or special venire should be summoned by an officer who is not disqualified by reason of interest, bias, or prejudice.'

"It appears, however, that in Oklahoma there is a statute providing that, when the panel is formed from persons whose names are not drawn as jurors, a challenge may be taken to the panel on account of the bias of any officer who summoned them, which would be a good ground to challenge a juror; such challenge to be made in the same form and determined in the same manner as if made to a juror.

"In *Patrick* v. *Commonwealth, supra,* it was held that the rule of the common law is that no one should take part in the selection of jurors who does not stand indifferent between the parties, and that there is nothing in the Virginia statute which changes this rule.

"In *People* v. *Felker, supra,* it was held that the right of an impartially selected jury is a common-law right, independent of any statute, and, where the summoning officer who selects the jurors is disqualified by reason of interest, is ground for challenge to the array.

"In *Jones* v. *Woodwarth,* 124 N. W. 844, 24 S. D. 583, Ann. Cas. 1912A, 1134, it was said:

> 'To permit the Sheriff under such circumstances to summon the jury where he is a party to an action to be tried by him affords him opportunity to exercise an improper influence over them.'

"[1] It is not, however, necessarily a ground of challenge that the officer who summoned the jury is a witness in that case, unless the statute so provides, or that he is a prosecuting witness. 35 C. J., Par. 240, p. 277.

"[2] If the Sheriff is disqualified to act, the jury should be summoned by the coroner, or by such other disinterested person as the court may appoint, but it is error for the court to appoint one of the Sheriff's deputies to summon the jury. The court may properly appoint an elisor if there is no coroner, or if the coroner is also disqualified. 35 C. J., Par. 241, pp. 277, 278.

"[3] We think the Sheriff and his deputies, by reason of their financial interest in the event of the

instant case, were disqualified to select or summon any of the jurors before whom the defendant was tried. It is highly proper to the fair and impartial administration of justice that the jury shall be selected by officers who are not interested in the event of the case. It is only by a strict observance of this rule that fairness and impartiality in jury trials can be accomplished and maintained. Every reasonable safeguard should be employed to protect juries from improper influence that might not otherwise affect them in their judgment in the trial of cases, both civil and criminal. This is the only way that the integrity of jury trials can be preserved."

As indicated above, there is no dearth of jurisprudence on this point from the Supreme Court of Mississippi. In *Lipscomb* v. *State*, 76 Miss. 223, 244, 25 So. 158, the following appears:

"The main purpose of all proceedings in the selection of juries, the care and control of them during the trial of the cause, and the prevention of improper influences being brought to bear upon them after they are impaneled, is to insure fair and impartial trials of causes, an honest verdict, based upon the real belief of the jurors as produced by the evidence legitimately and properly presented under the direction and control of the court. The main purpose of all trials cannot more effectively be promoted than by the court seeing to it that the duties of the Sheriff are not left to be performed by an interested person or one for other cause incapable or unfit to execute such duties in the particular case to be tried."

In *Ulmer* v. *Pistole*, 115 Miss. 485, 76 So. 522, objection was made that the brother of appellee was the Chancery Clerk of Lauderdale County, and, therefore, Clerk of the Board of Supervisors, and was required to participate in the drawing of the jury along with the Sheriff and Circuit Clerk, as provided by Section 2041 of the Mississippi Code of 1930, quoted *supra*. The court held that the relationship and participation were not such as to disqualify the clerk, but in so doing, it stated the contention of appellants as follows:

"For sound reasons of public policy the appellants should not have been forced to bear any of the possible consequences of this situation, even though no actual fraud was shown to have been committed."

In approving the general principle invoked, the court said:

"This principle contended for by appellants is well established in the common law, and is based upon the old idea that a person should not be placed in a position where there will arise a conflict between interest and integrity; that the temptation to do wrong should not be afforded by opportunity for fraud. We do not dispute the soundness of this view, and in proper cases the application of this principle should be made, but the case before us does not come fairly within this rule."

The frailties of the jury system were recently adverted to by this court in an opinion which, while not unanimous as to the result, appears to have expressed the views of all of the justices participating. This court has shown that if the advantages and safeguards of the jury system are to be preserved, it is necessary that its delicate mechanism be kept in proper alignment. In the case of *Glasser* v. *United States*, 315 U. S. 60, 85, the following appears:

"Jurors in a Federal Court are to have the qualifications of those in the highest court of the state, and they are to be selected by the clerk of the court and a jury commissioner. * * * This duty of selection may not be delegated * * * and, its exercise must always accord with the fact that the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a 'body truly representative of the community,' and not the organ of any special group or class. If that requirement is observed, the officials charged with choosing Federal jurors may exercise some discretion to the end that competent jurors may be called. But they must not allow the desire for competent jurors to lead them into selections which do not comport with the concept

of the jury as a cross section of the community. Tendencies, no matter how slight, toward the selection of juries by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trials, and should be sturdily resisted. That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may one by one lead to the irretrievable impairment of substantial liberties."

The question was properly raised by motion to quash the panel. This was implicit in the holding in *Lipscomb* v. *State, (supra)* 76 Miss. 223, 25 So. 158; and in the holding of the Supreme Court of Mississippi on the second appeal of this case, *J. W. Sanders Cotton Mill, Inc.*, v. *Moody,* 191 Miss. 604, 2 So. 2d 815, wherein the court said:

> "The question was properly raised in the court below by motion to quash the panel before the trial, and on motion for a new trial."

The question was also raised by the motion for new trial (R. 519-22).

2.

**Excursions into Collaterals.**

As stated above, petitioner does not contend that this court should retry this case on the merits. What petitioner does contend for is that this court should examine the record in this case, and the law of the State of Mississippi, and determine whether or not that law has been so applied as to deprive petitioner of its property without due process, and to deny to it equal protection of the laws. This court has recently affirmed the supremacy of the highest court of the state in the matter of interpreting and announcing the substantive law in all matters reserved to the state and not occupied by the central government in the exercise of its constitutional powers. It is axiomatic

that while due process contemplates certain minimum standards of procedure, the guaranties are substantive in their qualitative effect. The line of demarcation between substantive and procedural considerations are sometimes elusive to the professional, and are a hollow mockery to the litigant when his rights are made to turn upon them.

However, in the present case, it so happens that without regard to whether the question here presented be considered procedural or substantive, the last words on the question of how far a trial may be allowed to proceed into collaterals in the State of Mississippi, was uttered in the opinion rendered on the first appeal. In *J. W. Sanders Cotton Mill, Inc.*, v. *Moody*, 195 So. 683, at 688, the court said:

> "Over repeated objections by appellant, the court permitted appellee to impress the jury with witnesses produced by her who affirmed that, going back over a period of more than three years and to all parts of the mill, where these machines in a large number were in operation, clearer boards were often split or had holes bored in them; that some of them were homemade out of improper material; and that the nebs or latches were often broken off and missing in various parts of the mill, so that the clearer boards would fall off and thus be around the feet of the workers; that these would not be remedied or repaired and that those whose duty it was to repair would often fail to do and would give as an excuse that there was nothing at hand for the making of the repairs. In other words, that because some, or even many, clearer boards, separate and independent of each other, throughout a considerable length of time and throughout several parts of the mill, were defective or unsuitable, or for the same length of time nebs or latches were broken off or missing, then the particular board in this case at this particular time was unsuitable and this particular latch was at this particular time in some way defective. If such evidence were probative, then it could be said to be proof enough, when a person is in a town where there are

a number of merchants and meets a man on the street, that the man so met is a merchant. All the above was denied by every witness for defendant, but in view of the verdict these denials disappear.

"Appellee seeks to defend this testimony on the strength of such cases as *Crawford* v. *City of Meridian, Miss.*, 154 So. 888. In the cited case it was held that evidence of several previous accidents at the same point in the street is admissible. But there is no authority in that case that previous accidents happening throughout the municipality and at various points therein would be admissible. A case more nearly in point with what we have here is *Wilson & Co.* v. *Holmes*, 180 Miss. 361, 368, 177 So. 24; but we cannot prolong discussion of this question in an opinion already lengthy, and we, therefore, say here only that none of our cases, where the point is made, permit testimony to go so far into collaterals as was done in this case. Whatever may be the specific limitations as regards relevancy, there must always be the ultimate limitation that the testimony shall never run to such length in such matters as to raise a doubt whether the case was decided by the jury on the real issue or whether on the collaterals."

Petitioner submits that when the foregoing principles are applied to the record in this case, the judgment of the Circuit Court of Lauderdale County should have been reversed. The failure of the Supreme Court of Mississippi to reverse the judgment, without modifying the principle of law involved, amounts to a denial to petitioner of the protection of the law of this state.

3.

**Cumulative Effect of Improperly Organized Courts and Excursions into Collaterals.**

Attention has already been called to the improper conduct of counsel in making side remarks to the jury, such as was committed in the case of *Trott* v. *McDonough*, now pending on the docket of this court. Reference has

also been made to improper statements made in the guise of questions propounded on cross-examination. More important was the grilling of various witnesses produced by petitioner, in an effort to show personal animosity between them and Sheriff Ross. Of these matters, the Supreme Court of Mississippi has said (*J. W. Sanders Cotton Mill* v. *Moody, supra,* 195 So. 683, 688):

> "In view of the general attitude of this record there are several other instances which occurred in the taking of the testimony which cannot escape the attention of an examiner who would responsibly grasp its import, and wherein collateral matters were unduly pursued. For instance, in the cross-examination of the witness, Anders, the spinner foreman of the mill. It may be that the methods of this mill in that it had no concern whatever as to the welfare or safety of its workers; that it engaged in the indirect subornation of witnesses; that its harsh course of work might be described as the stretch-out system, about which this witness was taken so severely in hand on cross-examination, may, if true, have made this concern an undesirable member of the community; but there is too much danger in allowing examinations to go to such lengths that the particular merits may be obscured and that passion may be aroused by these extraneous considerations. As already otherwise stated, and under whatever principle it may be that evidence is adducible, and even on cross-examination touching the bias or interest of witnesses, it should never be permitted to proceed so far into collaterals as to raise a doubt whether the verdict is upon the real issues or whether upon general principles that the plaintiff or the defendant, one or the other, is by his general character or conduct deserving of a verdict against him, be the precise facts what they may. The attitude of this court on this subject is illustrated by what was said in *Jones* v. *State,* 159 Miss. 119, 131 So. 826.
>
> "And what was said in the case last cited bears upon the contention made here that the defendant did not at all times and in every place object to the

irrelevant testimony. Defendant shows that it made 138 separate objections, nearly all of which were overruled, whereas, most of them were so obviously well taken that it is difficult to see why they were not unhesitatingly sustained."

The undue prominence given to Sheriff Ross in this trial cannot be over emphasized. The first contact the members of the jury had with the court was when they were served with subpoenas by the Sheriff or his deputy. He had already been present when their names were placed upon the jury list. The names could not be placed in the jury box without his concurrence. No lawful drawing could be made except with his participation. Their attendance upon the court, their qualification, and their very presence in the court room was under the control and supervision of the Sheriff.

The action of the trial court in displacing the Sheriff and requiring the coroner to perform the duties of the office in connection with this trial, was in recognition of his bias and interest (R. 42-5). However, this action accentuated in the jury's minds that the Sheriff was a person in interest in the trial of the case, or that this was the case in which the Sheriff was interested. Moreover, the Sheriff continued in charge of the Court House and the premises belonging thereto, and presumably guarded the same from trespassers and intruders, as provided by Section 3331 of the Mississippi Code of 1930 quoted *supra*. Insofar as the juries were concerned, the damage had already been done, and nothing short of quashing the panel could have afforded petitioner the fair trial guaranteed to it. But the matter was not allowed to rest there. Witness the effort made to show the animosity existing between Dr. Klein, petitioner's witness, and the Sheriff (R. 359-70, 378, 440-1, 445). Notwithstanding what the Supreme Court of Mississippi had said with reference to the handling of the witness Anders on the first trial, notice the pitting of Anders against Ross, as shown by the

Record, at pages 340-1, 464, 482-5. See also Record pages 453-4.

As if this was not enough prejudice, Sheriff Ross was made a witness for Respondent to establish her case in chief (R. 208-13), and gave long, graphic, argumentative statements in answer to leading question designed to supply important details in the development of the case in chief. Thereafter, he was recalled to the witness stand on two occasions (R. 445, 465, 482-5). In fact, any juror returning a verdict for petitioner, if he had been personally acquainted with Sheriff Ross (and it must be remembered that all were subpoenaed through the Sheriff's office), would have felt constrained to apologize to him after the conclusion of the trial.

As already pointed out, full benefit was taken of this situation by counsel for Respondent in his argument to the jury. Such argument has been condemned by the Supreme Court of Mississippi in the following cases: *Mars* v. *Hendon*, 178 Miss. 157, 171 So. 880; *Mississippi Power Co.* v. *Stribling*, 3 So. 2d 807, 191 Miss. 832; *Newman Lbr. Co.* v. *Norris*, 130 Miss. 751, 94 So. 81; *Martin* v. *State*, 63 Miss. 505; *Herrin* v. *Daly*, 80 Miss. 340, 31 So. 790; *N. O. & N. E.* v. *Jackson*, 105 So. 770, 140 Miss. 375. Similar condemnation has been pronounced by this court in *New York Central* v. *Johnson*, 279 U. S. 310, and *Brassfield* v. *United States*, 272 U. S. 448.

The errors complained of are not errors of procedure, but are such as run counter to the fundamental concepts of justice which lie at the base of civil and political institutions in the United States, and offend against the constitutional inhibitions upon which petitioner relies. *Snyder* v. *Massachusetts*, 291 U. S. 97; *Powell* v. *Alabama*, 287 U. S. 45; *Norris* v. *Alabama*, 294 U. S. 587; *Mooney* v. *Holohan*, 294 U. S. 103; *Brown* v. *Miss.*, 297 U. S. 278; and see also *Morgan* v. *U. S.*, 298 U. S. 468, 304 U. S. 1.

## CONCLUSION.

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

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